



**MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY
AIR QUALITY DIVISION**

**OPERATIONAL MEMORANDUM
NO. 10**

**SUBJECT: PROCEDURES FOR HANDLING OF CONFIDENTIAL MATERIALS AND FREEDOM OF
INFORMATION REQUESTS FOR CONFIDENTIAL MATERIALS**

EFFECTIVE DATE: June 21, 1996

REVISED DATE: October 21, 1996 & February 28, 1997

EXECUTIVE SUMMARY:

There are cases when a facility may submit to the Department certain types of information that it considers confidential. Michigan Air Pollution Code describes the types of information (e.g. trade secrets) that are exempt from disclosure under the Freedom of Information Act (FOIA). The regulations also provide a time frame for the facility to demonstrate to the Department why the information designated as confidential should not be disclosed. This Operational Memorandum outlines a proactive approach in the receipt and management of confidential materials that streamlines handling at the time of a FOIA request.

Information marked confidential received after the date of this memo will be processed promptly upon receipt by either Lansing or District staff. This will ensure that review and justification is not required when Freedom of Information Act requests are received and processed for public files containing information marked confidential. Confidential information is contained in secure areas. Information marked confidential shall be reviewed during technical review for permits to Install, Emission Inventory and Renewable Operating Permits. This will eliminate the need to process information marked confidential at the time of the FOIA request.

Finally, this memorandum provides for the FOIA coordinator or District staff designee to send to the requester the non-confidential portion of the files. The coordinator or designee also encloses a formal letter of denial for the confidential portion from the Department FOIA officer.

PREAMBLE:

Air Quality Division (AQD) has not developed or implemented a formal procedure for handling Freedom of Information Act (FOIA) requests for public files which contain confidential information. Confidential information may be received by staff, as portions of permit applications, emission inventory reports, as supplemental information, or during field inspections. Current handling of the information marked confidential by the regulated person varies by location. However, AQD staff have consistently separated information marked confidential from the public files and placed it in locked cabinets. This Operational Memo (Op Memo) provides procedures for consistent management of confidential information, and streamlines the handling of confidential information when it is subject to a FOIA request.

The Freedom of Information Act (FOIA), Public Act 442 of 1976, provides for the release, within 5 business days of a request, of information held by public bodies. FOIA also contains provisions for the public body to exempt from disclosure records of information according to statute. Public Act 451 of 1994, the Natural Resources and Environmental Protection Act, Part 55, Section 5516, provides the statute whereby the Air Quality Division may exempt from disclosure information determined to meet the criteria for confidentiality. Section 5516 (3) further contains provisions for the regulated person asserting confidentiality, to demonstrate within 25 days of notification by staff, why information marked as confidential should not be released. Any information submitted to staff after the date of this Operational Memo is to be screened upon receipt for the presence of information marked confidential. The confidential information will be reviewed according to New Source Review (NSR) or Renewable Operating Permit (ROP) procedures.

Information processed in accordance with the procedures in this Op Memo and held as confidential will not require a justification from the company who asserts confidentiality at the time of a FOIA request. Any information submitted prior to this operational memo, that had been screened for the existence of confidential information, but not reviewed

as to whether it meets the criteria, may be reviewed during the time of the FOIA request. If a dispute arises concerning release/holding the information, Section 5516 (3) will be followed. Provided below are applicable sections of Acts 442 and 451:

The Freedom of Information Act, Public Act 442 of the Public Acts of 1976, specifies in Section 3 that “*upon oral or written request which describes the public record sufficiently to enable the public body to find the public record, a person has the right to inspect, copy, receive copies of a public record of a public body, except as otherwise expressly provided by section 13.*” Section 13 of the act deals with specific types of information that are exempt from disclosure under the Act.

Section 5 of FOIA covers the time a public body has to respond to a request, the allowable responses, failure to respond, court order to disclose information, contents of denial notice, signing of denial notice, notice for extending response period, and grounds for commencement of action by requester. Page 269 of The Attorney General Opinion No. 5500 published on July 23, 1979 specifies that the response period starts the day after a request “sufficiently describing” the public record is received. Further, if Lansing personnel receive a request that may only be filled from the District Office, the response period, or 5 days, starts on the date that District receive the request from Lansing, as long as the request was forwarded in a reasonable time frame.

Confidentiality of submitted information related to external communications is addressed in Section 13(1) (d) and (g), (i) through (iii) Public Act 442 of the Public Acts of 1976.

The following are the pertinent conditions under which confidentiality may be claimed:

Sec. 13(1) A public body may exempt from disclosure as a public record under this act.

(d) Records or information specifically described and exempted from disclosure by statute.

(g) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:

(i) The information is submitted on a promise of confidentiality by the public body.

(ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.

(iii) A description of the information is recorded by the public body within a reasonable time after it is submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision shall not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

Public Act 451 adds more conditions onto the restrictions for confidentiality with the following:

Sec. 5516. (2) A copy of each permit application, order, compliance plan and schedule of compliance, emissions or compliance monitoring report, sample analysis, compliance certification, or other report or information required under this part, rules promulgated under this part, or permits or orders issued under this part shall be available to the public to the extent provided by the Freedom of Information Act, No. 442 Of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan compiled laws.

(3) A person whose activities are regulated under this part may designate a record or other information, or portion of a record, permit application, or other information furnished to or obtained by the department or it's agents, as being for the confidential use of the department. The department shall notify the person asserting confidentiality of a request for public records under section 5 of the freedom of information act, Act No. 442 Of The Public Acts of 1976, being section 15.235 of the Michigan Compiled Laws, the scope of which includes information that has been designated by the regulated person as being confidential. The person asserting confidentiality has 25 days after the receipt of the notice to demonstrate to the department that the information designated confidential should not be disclosed because the information is a trade secret or secret process, or is production, commercial, or financial information the disclosure of which would jeopardize the competitive position of the person from whom the information was obtained, and make available information not otherwise publicly available. The department shall grant the request for information unless the person regulated under this part demonstrates to the satisfaction of the department that the information should not be disclosed. If there is a dispute between the person asserting confidentiality and the person requesting the information under Act No. 442 of the Public Acts of 1976, the department shall make the decision to grant or deny the request. After the department makes a decision to grant a request, the information requested shall not be released until 8 business days after the regulated person's receipt of notice of the departments decision. This does not prevent the use of the information by the department in compiling or publishing analyses or summaries

relating to ambient air quality if the analyses or summaries do not identify the person or reveal information which is otherwise confidential under this action. This section does not render data on the quantity, composition, or quality of emissions from any source confidential. Data on the amount and nature of air contaminants emitted from a source shall be available to the public.

Along with these Acts, there is a Director's Letter that specifies the Department FOIA Officer who is authorized to write letters of denial.

POLICY

The AQD will use a proactive approach in the handling of confidential material. Newly received material will be screened upon receipt to determine if confidential information is present. The information marked as confidential will be reviewed to determine if it meets the criteria for confidentiality. This approach will insure that all new information filed as confidential meets the statutory requirements of Section 5516 (2) and (3) of Public Act 451 of 1994. Information received after the date of this memo will be processed promptly upon receipt to ensure that further screening, reviewing and justification is not required when Freedom of Information Act requests are received and processed for public files containing information marked confidential.

In general, material that is marked confidential when received, will be separated from the rest of the document and kept in a designated, locked cabinet. The material marked confidential will be reviewed to insure that it is a trade secret; secret process; or production, commercial, or financial information; which, if released, would jeopardize the applicants' competitive position. Confidential information shall be reviewed during the technical review by either a Lansing Permit Engineer or District Staff assigned to the source.

If the above mentioned criteria are not met, the company supplying the information shall be notified and asked to justify their assertion that the material is confidential. Once the justification is received, the department shall make the final decision as to whether or not the material is confidential.

FREEDOM OF INFORMATION ACT

For all material previously reviewed for confidentiality, responding to requests for information under the Freedom of Information Act will be handled as follows. If a requested document contains confidential information, the FOIA coordinator or District staff designee will send, to the requester, the non-confidential portion and a formal letter of denial for the confidential portion from the department FOIA officer.

FOIA requests for documents containing old confidential information (marked confidential contained in locked cabinets, and submitted prior to the date of this memo) not previously reviewed for confidentiality, shall be processed according to the procedure in Section 5516 (3) of Public Act 451 of 1994. The FOIA coordinator or district staff designee will provide the requester with the public files, withholding the confidential information. This person will also notify the FOIA officer who will send a formal letter of denial to the requester. At the same time, the company will be asked to provide written justification of confidentiality. The company will have 25 days from receipt of notification to demonstrate to the satisfaction of the department that the information should not be disclosed. If it is not submitted or confidentiality is denied by the department, the regulated person formerly asserting confidentiality will be notified that after 8 business days of receipt of notice the withheld information will be sent to the FOIA requester.

Division wide continuity of policy for handling confidential information is provided in this Operational Memo. Lansing and District staff will follow the general procedures for processing FOIA requests. The variations specified in the NSR and ROP sections for handling confidential information will be followed by NSR and ROP staff respectively.

PROCEDURE FOR GENERAL SUBMITTALS:

- I. General handling of confidential information contained in applications, supplemental materials, emission inventory data, and obtained during field inspections, or otherwise submitted to the AQD.
 - A. Application and miscellaneous material receipt and handling. The submittal, upon receipt by the Division, must be screened to determine if it contains material marked confidential by the company. The submittal is then processed using 1 of the following:
 1. If the submittal does not contain confidential information, staff shall process using normal procedures for public files.
 2. If the submittal contains information marked confidential, staff shall separate the confidential portion from the public files and proceed with the following:

- a. Staff attaches a note to the non-confidential portion of the document which provides the following information:
 - (i). A statement that notes that a portion of the document is classified confidential.
 - (ii). A general description of the type of information contained in the confidential portion.
 - (iii). Specifies the location where the confidential portion is filed.
- b. Staff, assigned to the facility, shall review the confidential portion of the submittal.
3. Staff shall review it within a reasonable time frame. The Lansing permit engineer or District source person determines if it meets the statutory criteria.
- B. After the portion of the submittal, marked confidential by the company, has been reviewed, staff shall proceed with 1 of the following:
 1. If all the information in the submittal meets the statutory test:
 - a. Attach a note to the document stating that, "we reviewed and agree that the information is confidential."
 - b. Place in locked designated file cabinet.
 2. If the submittal contains material that does not meet the statutory requirements for confidentiality, notify the company and specify which items do not meet the criteria for confidential classification. The company must respond to the notification. The material is contained in files designated for confidential material while staff determines if the facility's demonstration of confidentiality is valid.
- C. Staff reviews the company's response to ensure that the items specified in the written request have been addressed. The material is processed as follows:
 1. If the facility has changed its assertion of confidentiality, staff should request unmarked material to replace the original "marked confidential" information; or return the information to the facility; or the information may have a note attached stating that, "the information has been reviewed and determined to not be confidential," and place in the public file.
- D. If the company response does not resolve all issues, then the department shall do all of the following:
 1. Staff shall follow the chain-of-command when denying the request for confidentiality. Currently, the decision making responsibilities for denials rests with the Division Chief.
 2. The Division Chief shall notify the company, by certified letter, that a portion of the material, specifying exactly the items, does not meet the statutory requirement for confidentiality and the department considers the material to be non-confidential and releasable to the public upon request.
 3. Staff shall maintain the information in the locked cabinets until the dispute is resolved.
- E. If the department determines that the information is not confidential, but necessary to have in the files, staff will affix a note stating that, "the material is not confidential" and place it in the public files. (The company may supply unmarked material to replace the original).

PROCEDURE FOR NEW SOURCE REVIEW:

- I. Application and miscellaneous material receipt and handling.
 - A. The application is screened in typical manner for the presence of confidential information. It is assigned to a specific staff member for review.

1. This reviewer determines whether or not the information marked "confidential" meets the appropriate criteria; that is, the information must either be:
 - a. A "trade secret" or "secret process", or
 - b. Production, commercial, or financial information which, if released, would jeopardize the applicant's competitive position.
 2. The engineer separates the information he or she has determined to be confidential from the rest of the application and files it in a locked cabinet.
- B. Completion of the permit review and approval of the permit.
1. The reviewer is responsible for insuring that the non-confidential file indicates that confidential information is available and is located in a designated, locked cabinet.
 2. The reviewer separates the confidential information from the file and places it into the designated cabinet.
- C. When a reviewer disagrees with the claim of confidentiality:
1. The reviewer must notify the applicant.
 - a. This may be via telephone with a written follow-up.
 - b. This occurs as part of the reviewer's cursory review, after having been assigned the application.
 2. The reviewer notifies the
 - a. District Permit Coordinator, or staff assigned to the source.
 - b. His or her immediate supervisor (Unit Chief).
 3. Normal chain-of-command decision making must be followed. Currently, the decision making responsibilities for denials rests with the Division Chief.
- D. Handling of material agreed to by staff and applicant as to not meeting the criteria for confidentiality.
1. Under no circumstances is Division staff to cross-out, white-out or otherwise alter a confidential stamp by cross-out, white-out or otherwise.
 2. The material should be returned to the company or shredded and replaced by the company with the same information that has not been marked confidential.
 3. The material may be placed in the public files with a note stating information not considered confidential..
- E. Handling of outdated, confidential information.
1. After discussing with his/her supervisor, either
 - a. Return information to applicant, or
 - b. Shred it.
 - c. Place in public file with note attached.
 2. Notify District staff of action .

NOTE: Permit reviewers shall inform District staff whenever they challenge a claim of confidentiality. Likewise, the District staff shall notify Permit Section staff if they receive and challenge a company's claim of confidentiality.

II. FOIA Handling (Refer to FOIA Procedure).

PROCEDURE FOR RENEWABLE OPERATING PERMITS

I. Receipt and handling of Confidential Information for ROP.

- A. The AQD District Office secretary notes if the application received has been sent to the correct District office.
 1. If so, the secretary date stamps the application and logs it in.
 2. If not, the secretary forwards the application to the correct District office.
- B. The AQD District secretary checks for the presence of confidential information (prior to administrative completeness check).
 1. If information marked confidential is present, it is separated from the application.
 - a. Placed in a designated , locked, file cabinet.
 - b. The application is placed in a file folder which is marked "confidential information for this source."
 - c. The application is reviewed for administrative completeness.
 2. If information marked confidential is not present, the application is reviewed for administrative completeness,
- C. The confidential information is reviewed at the time of the technical review of the application.
 1. The reviewer must determine if the information
 - a. Is a trade secret or secret process, or is
 - b. Production, commercial or financial information the disclosure of which would jeopardize the competitive position of the person from whom the information was obtained.
 2. Maintain the information in the locked cabinets while a decision is being made.
- D. The technical reviewer decides whether the information provided by the company asserting confidentiality meets the criteria.
 1. If the reviewer agrees with the person asserting confidentiality, the information is maintained in the locked cabinets. A note is attached stating that material "has been reviewed and agree is confidential."
 2. If the reviewer disagrees with the person asserting confidentiality
 - a. He/she notifies the applicant promptly.
 - b. The applicant must demonstrate to the satisfaction of the department that the information meets the criteria for confidentiality.
 - c. Staff notifies his/her immediate supervisor. Normal chain-of-command decision making shall be followed. Currently, the decision making responsibilities for denials rests with the Division Chief.
 - d. The information is maintained in the locked cabinets while the dispute is being resolved.
- E. The technical reviewer reviews the company's justification and advises his/her chain-of-command of the status of the review.
 1. If the department determines the information does not meet the criteria of confidentiality, the confidential stamped information is returned to the company, or shredded, or replaced by the

company. The information if necessary to the files may have a note attached which states reviewed and not considered "confidential" and placed in public files.

II. FOIA Handling (Refer to FOIA Procedure)

PROCEDURE FOR FOIA HANDLING:

I. Receipt and handling of FOIA requests.

- A. Request is received and immediately forwarded to the FOIA coordinator, or district staff designee.
- B. FOIA coordinator or district staff designee reviews the request and forwards the request to the appropriate staff person. A decision is made as follows:
 1. The material requested is readily available and the request can be processed within the 5 day timeline.
 2. The FOIA request cannot be processed within 5 days because additional time is required to prepare the document and/or the document is located at another location or in archive storage. (In this case, a one time 10 day extension may be requested. However, the request must be made within 5 days of receipt of the FOIA request.)
 3. If the public file indicates that a portion of the information has been determined to meet the criteria for confidentiality and is located in the confidential file, then the FOIA Coordinator or district staff designee shall prepare a formal letter of denial for the FOIA officer's signature detailing the exact reason (including brief description) (Section 13 of PA 442 of 1976) why a portion of the file was withheld. Within the 5 day period of filing (non-confidential only) the FOIA request, the FOIA officer shall sign the letter for partial denial of the files. This letter will be mailed with the non-confidential portion of the files to the requester. Staff shall handle the request for confidential information as follows:
 - a. Staff shall notify a company that their files have been FOIA'd and that confidential information has been withheld from the requester.
 - b. Staff may question the current confidential status of the document because the technology has changed, the information has not been previously reviewed against the statutory requirements for confidentiality, or the company must be notified that the document has been requested under FOIA. The company has 25 days from receipt of notification to respond to the department to demonstrate confidentiality. (This also applies if staff reviews the confidential information at the time of the FOIA request and disagrees with a former department determination because equipment is no longer patented, technology has changed, etc.). The department will then decide as follows:
 - (i) Agree with company and keep document confidential. Staff shall inform company of decision.
 - (ii) Disagree with company and notify them that the department will release the information within 8 working days after the company has received notification, by certified mail, of the decision to release the information.
 4. If the document is totally confidential, the department FOIA officer must be notified immediately by the permit coordinator or district staff designee, so that a letter of denial is sent to the requester, and the company is notified as required by subsections 3, (a) or (b) above.
 5. If no document that reasonably fits the description of the requested document exists, the FOIA coordinator or district staff designee must write a letter, within 5 days of receipt of request, of denial stating that the document does not exist.

This memorandum is intended to provide guidance to AQD staff to foster consistent application of Part 55 of Act 451 of the Public Acts of 1994, the Natural Resources and Environmental Protection Act and the administrative rules promulgated thereunder. This document is not intended to convey any rights to any parties nor create any duties or responsibilities under law. This document and matters addressed herein are subject to revision. Questions regarding this memorandum should be directed to Ms. Elli Hennessy at 517-684-9141, extension 8256.

RSJ:EH:amh